

State Bar of Wisconsin Public Records, Open Meetings Update 2022

Wisconsin Department of Justice
Office of Open Government



Open Meetings Basics

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State Bar of Wisconsin

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Presentation Overview

- Outline open meetings law essentials, including:
 - What constitutes a governmental body
 - When a meeting occurs
 - Meeting notice requirements
 - Open sessions v. closed sessions
 - Citizens' roles in meetings, including participation and recording
 - Voting during meetings
 - Meeting record-keeping requirements
 - Enforcement



INTRODUCTION



Importance of Government Transparency

- “Transparency and oversight are essential to honest, ethical governance.”
John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862
- **Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98**
 - The purpose of the open meetings law is to ensure openness
 - Only a few limited exemptions permit confidentiality
 - The open meetings law is to be broadly interpreted to promote openness



Public Policy

- “In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that **the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.**”



— Wis. Stat. § 19.81(1)



Essentials

- Generally, the open meetings law requires that all meetings of governmental bodies:
 - must be preceded by **public notice**; and
 - must be **publicly held** in a place that is **reasonably accessible** and **open** at all times to all members of the public;
 - except in limited situations in which a **closed session** is specifically authorized.



GOVERNMENTAL BODIES



Governmental Body

- “Governmental body’ means a state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order” Wis. Stat. § 19.82(1).
- Translation:
 - Any kind of **collective governmental entity** (state or local level).
 - **Created by** constitution, statute, ordinance, rule or order.
 - Without regard to what that entity is called (i.e., a board, commission, committee, council, etc.).
- **Includes purely advisory bodies**, governmental corporations, quasi-governmental corporations, and formally constituted subunits
- Generally, a governmental body does not include a group of administrative staff of a government agency.
 - Highly fact-specific issue.



Governmental Bodies: Collective Entities

- Collective governmental entity
 - Must be a **group** of people.
 - Does not include a single, individual government official.
 - Must have a **collective identity and purpose**.
 - A group with a **determinate membership** and an expectation that it will **act collectively** in relation to some subject of governmental business.
 - Does not include an *ad hoc* gathering.



Governmental Bodies: Creation

- “[C]reated by constitution, statute ordinance, rule or order”
 - Refers not to the kind of power wielded by a governmental body, but rather to how the body is created.
- How to determine whether a body is created by constitution, statute, ordinance or rule?
 - Look it up.
- How to determine whether a body is created by order?
 - An order can include **any directive** — whether formal or informal — that creates a body and assigns it some governmental responsibilities. See 78 Op. Att’y Gen. 67 (1989).
 - Such a directive may be issued by any governmental official or entity that has the power to delegate the governmental responsibilities in question.
 - **Note:** This is a very fact-specific standard, so there are no bright-line rules.



MEETINGS



Meeting

- “‘Meeting’ means the **convening** of members of a governmental body for the **purpose** of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” Wis. Stat. § 19.82(1).
 - Not limited to face-to-face gatherings or physical presence together.
 - Examples: telephone calls, emails, virtual meetings, other electronic forms of communication



Meetings: The *Showers* Test

- The Wisconsin Supreme Court established a two-part test. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
 - A meeting occurs whenever:
 - Members convene for the purpose of conducting governmental business (**purpose** requirement)
 - The number of members present is sufficient to determine the body's course of action (**numbers** requirement)
 - Includes **negative quorums**



Meetings: “Purpose” Requirement

- “Conducting governmental business” is an expansive concept that is not limited to formal or final decision making.
- “Conducting governmental business” includes:
 - preliminary decisions
 - discussion
 - information gathering
 - interaction among members is not required
- *State ex rel. Badke v. Greendale Vill. Bd.*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).



Meetings: “Numbers” Requirement

- This number is not necessarily equal to a majority of the membership or to a quorum of the body.
- A sufficient number of members to determine a body’s course of action can refer to either:
 - the affirmative power to pass an action or
 - the negative power to defeat an action
 - Sometimes referred to as a “**negative quorum**”
- Fact-specific depending on the governmental body



Meetings: “Convening” of Members

- Members must convene for there to be a meeting
- Not limited to face-to-face gatherings or physical presence together
- Includes situations in which members are able to effectively communicate with each other and exercise the body’s authority
- If members communicate without physically gathering together, the key question is:
 - **To what extent do their communications resemble a face-to-face exchange?**



Meetings: “Convening” of Members (cont.)

- A “convening” of members can occur through **written correspondence, telephone and video conference calls, virtual meetings, emails**, and other forms of **electronic messaging**.
- **Technology** creates risk of private communication that should be held at public meetings
 - Important to keep in mind with increase in use of virtual workplace platforms
- To minimize the risk of violations, **caution is advised**:
 - Use only for one-way transmissions
 - Do not send replies or minimize their distribution
 - If a reply is needed, do not reply to all; reply only to the sender
 - Do not use for debate/discussion or polling/voting
 - Could be construed as a “walking quorum”
 - Limit the use of attachments/editing among members



Meetings: Serial or “Walking” Quorum

- “Walking” Quorum: A meeting resulting from a series of gatherings among body members
- Elements of a “walking” quorum:
 - A series of gatherings among groups of members
 - Each smaller in size than a quorum
 - Agreement to act uniformly
 - In sufficient number to control the body
- The “walking” quorum concept is intended to prevent circumvention of the law through the use of an agent or surrogate to obtain collective agreements of members outside a public meeting.
- **Practical Tips:**
 - “Walking” quorum issues are complex and fact-specific
 - Consult with your legal counsel



NOTICE



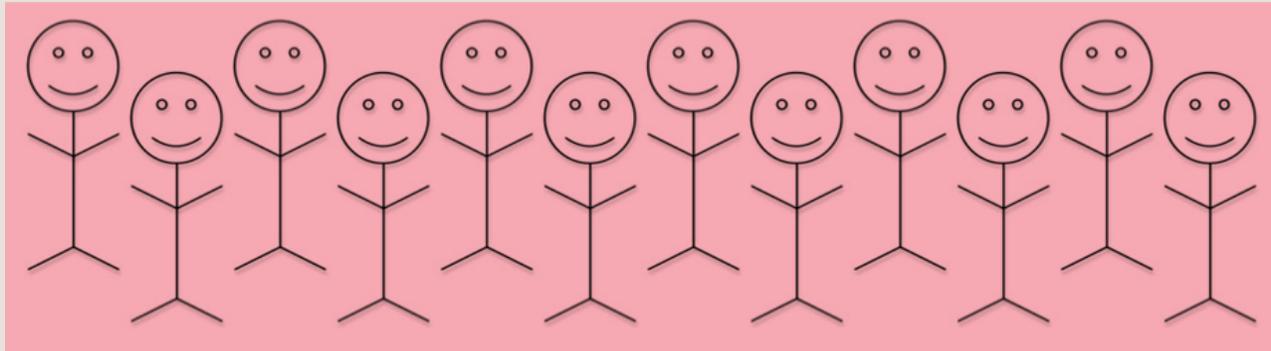
General Notice Requirement

- “Every meeting of a governmental body shall be preceded by public notice”
Wis. Stat. § 19.83(1).
- Notice must be communicated to:
 - The **public**
 - **News media** that have filed a written request for notice
 - The **official newspaper** for the community in question
 - If none, then a news medium likely to give notice in the area
- Presiding officer is legally responsible for ensuring notice requirements are met
 - Tasks may be delegated but presiding officer liable for any violations



Manner of Notice to the Public

- Notice to the public **must** be made using one of the following methods:
 - **Posting** in at least **3 public places** likely to give notice to persons affected
 - **Posting** in at least **1 public place** and on the body's **Internet site**
 - **Paid publication** in news medium likely to give notice to persons affected



Timing and Content of Notice

- “Every meeting of a governmental body shall be preceded by public notice” Wis. Stat. § 19.83(1).
 - Separate notice must be given for **each** meeting at a time and date reasonably proximate to the meeting. Wis. Stat. § 19.84(4).
- Notice must be communicated **at least 24 hours before** the meeting.
- The meeting notice must reasonably inform the public of the **time, date, place, and subject matter** of the meeting.

NOTICE



Content of Public Notice: Subject Matter

- How detailed must a notice be in describing the subject matter of a meeting?
 - The Wisconsin Supreme Court has said that the description must be **reasonable under all of the relevant circumstances** of the particular case. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.
- Relevant circumstances include:
 - The burden of providing more detail
 - The degree of public interest in the subject
 - Whether the subject is non-routine
- Notice should **not** use generic, uninformative subject-matter designations, such as:
 - Old or new business
 - Agenda revisions
 - Miscellaneous business, etc.
- Notice should include the subject matter of any contemplated closed session



OPEN SESSIONS



Open Session Requirements

- “[A]ll meetings of all state and local governmental bodies shall be **publicly held in places reasonably accessible** to members of the public and **shall be open** to all citizens at all times **unless otherwise expressly provided by law.**” Wis. Stat. § 19.81(2).
- “‘Open session’ means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times” Wis. Stat. § 19.82(3).



Open Sessions: Reasonably Accessible

- Three aspects to public accessibility:
 - Physical **location** in the community
 - Meetings should be held within the body's geographic area
 - May not be held on private premises unless open and reasonably accessible to public
 - **Room size** and acoustics
 - Must be reasonably calculated to accommodate all citizens who wish to attend
 - Body members must take reasonable steps to make it possible to be heard
 - **Physical accessibility**
 - In open session, the room should be **unlocked**
 - If doors must be closed due to noise, notice should be posted inviting entry
 - Accessibility for people with disabilities
 - State bodies must meet in facilities people can access w/o assistance. Wis. Stat. § 19.82(3).
 - Statute not applicable to local bodies, but they must provide reasonable access



Reasonably Accessible: Covid's Impact

- The law requires meetings to be held in places “**reasonably accessible**” to the members of the public and open to all citizens at all times unless otherwise provided by law. Wis. Stat. § 19.81(2).
 - The type of access that constitutes reasonable access during pandemic circumstances may be different from the types of access required in other circumstances.
 - Whether a meeting is “reasonably accessible” is a factual question determined on a case-by-case basis.
- Under pandemic circumstances, governmental bodies can typically meet their open meetings law obligations while being mindful of the public health situation by conducting meetings via **telephone or video conference calls**.
 - However, the **public must be provided an effective way to monitor the calls**.
- **Notices** must include instructions on how to attend the meeting remotely, including any required call-in number and/or log-in information.



Reasonably Accessible: Covid's Impact (cont.)

- Best practices:
 - It is advisable for bodies to keep the public health situation, government guidance, and health concerns of the public in mind when making decisions regarding conducting open meetings.
 - Bodies should be mindful that it may be burdensome, infeasible, or impossible for some members of the public to attend in person or remotely.
 - Bodies should **facilitate reasonable access** to meetings for such individuals.
 - For example, bodies could hold meetings in person with a remote option.
 - **Bottom Line:** The more access to meetings, the better. Providing multiple options — even post-pandemic — to the public to attend meetings helps to fulfill the purpose of the open meetings law.



Open Sessions: Citizen Participation

- The open meeting law ensures the right to **attend and observe** open session meetings
- The law does **not** require a body to allow the public to speak or actively participate
- However, the law **permits** a portion of an open meeting to be set aside as a **public comment period**
 - Public comment periods are **not** required
 - Such a period must be included on the meeting notice
- During a public comment period, a body:
 - may **receive information** from the public and
 - may **discuss** any subject raised by the public but
 - may **not** take formal action



Open Sessions: Recording

- Wis. Stat. § 19.90:
 - Bodies must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session.
 - Recording or photographing activities may not disrupt the meeting.
- The open meetings law does not require governmental bodies to permit citizens to record closed sessions.



Open Sessions: Voting

- Unless otherwise specifically provided, no secret ballots may be used except for electing officers of the body.
- Any member may require a roll-call vote.



Open Sessions: Record Keeping

- All motions and roll call votes must be recorded and preserved
 - Law does not specify a timeframe in which such records must be created.
 - However, it is advisable that motions and roll call votes should be recorded at the time of the meeting or as soon thereafter as practicable
- Voting records must be open to public inspection to the extent required under the public records law
- The open meetings law does not itself require bodies to keep formal minutes of meetings
 - However, minutes are often required by **other statutes** for certain types of bodies



CLOSED SESSIONS



Closed Sessions: Required Procedure

- Every meeting must begin in open session
- To go into closed session, a motion must be duly made and carried in open session
- The vote of each member must be recorded
- Before a vote to go into closed session, the presiding officer must announce:
 - The statutory exemption(s) authorizing the closed session and
 - The nature of the business to be considered



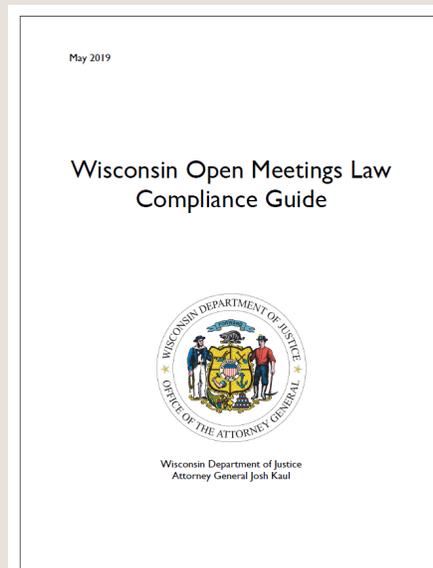
Closed Sessions: Scope and Attendance

- Limited scope
 - When a governmental body is in closed session, it must limit its discussion:
 - to the specific business for which the closed session was authorized and
 - may not take up any other matters
- Attendance
 - A body has discretion to allow anyone to attend a closed session
 - No duly elected or appointed member of a body may be excluded from any meeting of that body—whether closed or open
 - A member also may not be excluded from a meeting of a subunit of the body, unless the body has a rule to the contrary



Closed Sessions: Authorized Subjects

- The specific subjects for which closed sessions are authorized (exemptions) are set out in Wis. Stat. § 19.85(1).
- The following slide includes some commonly used exemptions; it is not a complete list. For a more complete discussion of this topic, see **DOJ's *Wisconsin Open Meetings Law Compliance Guide***.



Closed Sessions: Authorized Subjects (cont.)

- (a) **Deliberating about a case** that has been the subject of a judicial or quasi-judicial trial or hearing before the body. Wis. Stat. § 19.85(1)(a).
- (b) Considering **dismissal, demotion, licensing or discipline of a public employee** or the investigation of charges against the employee. Wis. Stat. § 19.85(1)(b).
- (c) Considering **employment, promotion, compensation, or performance evaluation data** of a public employee. Wis. Stat. § 19.85(1)(c).
- (d) Considering specific applications of probation, extended supervision or parole, or **considering strategy for crime detection or prevention**. Wis. Stat. § 19.85(1)(d).
- (e) Deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting “other specified public business” whenever **competitive or bargaining reasons require a closed session**. Wis. Stat. § 19.85(1)(e).
- (f) Considering **sensitive personal information** that would be likely to have a substantial adverse effect upon an individual’s reputation. Wis. Stat. § 19.85(1)(f).
- (g) **Conferring with legal counsel** about strategy related to litigation. Wis. Stat. § 19.85(1)(g).



Closed Sessions: Voting

- Under a prior version of the law, the Wisconsin Supreme Court held that a body can vote in closed session, **if the vote is integral to the authorized subject of the closed session**. *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963).
- More recently, the Wisconsin Court of Appeals indicated that a body should vote in open session unless a closed vote is expressly authorized. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (Ct. App. 1985).
 - The Wisconsin Court of Appeals did not discuss *Cities Service Oil Co.* and the older decision remains binding precedent.
- DOJ advises bodies to vote in open session unless it would compromise the purpose of the closed session.



ENFORCEMENT



Enforcement: Options and Penalties

- The open meetings law may be enforced by the attorney general, local district attorney, or by a private relator. Wis. Stat. § 19.97:
- Penalties:
 - Civil forfeiture of \$25 to \$300 per violation for any **member** of a body who **knowingly** attends a meeting held in violation of the open meetings law or otherwise violates the law
 - A member is **not** liable for attending an unlawful meeting if the member makes or votes in favor of a motion to prevent the violation from occurring. Wis. Stat. § 19.96.
 - Members of a body who — acting openly and in good faith — seek and rely upon the advice of the body’s official legal counsel may not be found liable for any violation
- An **action** taken at an unlawful meeting may be **voidable** if:
 - the court finds that the public interest in the enforcement of the open meetings law outweighs the public interest in sustaining the validity of the action

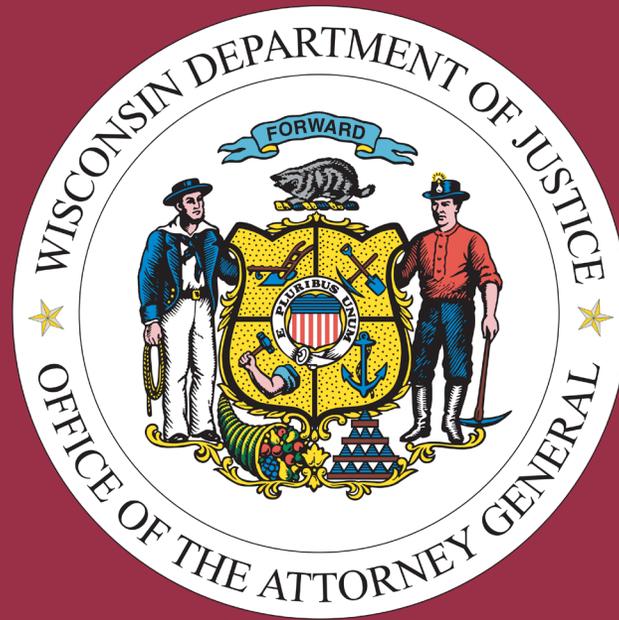


Further Information

- Download **DOJ Compliance Guides** and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- Contact the Office of Open Government:
 - Location: AG's Capitol Office, 114 East
 - Main Tel: (608) 267-2220
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 - Paul Ferguson: (608) 264-9464
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Thank You!

